New York City Environmental Law Leadership Institute

Public Power: Examining legal challenges facing the movement for publicly-owned utilities in New York

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Introduction

Across New York, there is a growing "Public Power" movement to replace New York's current system of privately-held utilities with publicly-owned utilities. Citing climate change and equity concerns, Public Power advocates argue that the current model for electricity delivery has failed everyday New Yorkers. Instead, advocates have proposed two bills—NY Build Public Renewables Act and the New York Utility Democracy Act—to bring private utilities under state ownership. This whitepaper examines the movement's motivations, proposed legislation, and notable legal challenges a public takeover of privately held utilities might present in New York.

I. A brief history of United States electricity regulation

Since the advent of electricity, private companies have provided most electricity to consumers in the United States.[1] However, even in the early days of electric service, many people recognized that private electricity had failures: profit motives disincentivized utilities from providing high quality service.[2] In response, an early movement for municipalization—i.e., public ownership and management of utility services—emerged as customers and localities sought better service.[3] The movement quickly gained steam: by 1907, municipal power companies made up 30% of electricity suppliers.[4]

To push back against the municipalization movement, utilities in the early twentieth century moved to support state regulatory commissions, which they saw as a friendlier alternative to municipal takeovers.[5] The creation of state regulatory commissions lessened the desire for

[1] Shelley Welton, *Public Energy*, 92 N.Y.U. L. Rev. 267, 280 (2018).
[2] *Id.* at 286.
[3] *Id.* at 286-87.
[4] *Id.* at 286-87.
[5] *Id.* at 287.

municipalization.[6] But, after the energy crisis of the 1970s and after a change in federal law requiring utilities to allow power purchased by other entities to cross their transmission lines, there were additional small waves of municipalization.[7]

Critics of the current majority electric system—privately controlled utilities loosely regulated by public utility commissions—have long worried that utilities have perverse incentives that lead them to overcharge customers for inadequate services. For example, utilities have an incentive to overbuild electric infrastructure so that they can raise rates, even if that infrastructure is unnecessary.[8] Beyond perverse incentives, there are risks that public utility commissions are ill equipped to properly regulate privately controlled utilities, as the utilities operate at an informational advantage compared to the commissions, and can be subject to industry capture by the utilities they are meant to regulate.[9] Empirically, there is evidence that customers of private utilities are overcharged for their electric service: the approximately fourteen percent of Americans served by public power systems pay, on average, eleven percent less than customers of private utilities.[10] Under a public system, "when [the power operator] see[s] an advantage for the community's citizens, [it doesn't] have to worry about what is best for shareholders."[11]

Around the country, concerns about poor service, overcharging, and climate change have catalyzed campaigns to place privately held utilities under public control. Following a campaign in Boulder, Colorado to municipalize that city's energy supply,[12] public seizure campaigns have

[6] *Id.* at 288.
[7] *Id.* at 289.
[8] *Id.* at 292.
[9] *Id.* at 292.
[10] States and Facts, American Public Power Association, https://www.publicpower.org/public-power/stats-and-facts (last visited Nov. 7, 2021).
[11] Welton, *supra* at n. 1, at 304.
[12] Welon, *supra* n. 1, at 306.

sprung up around the country. At the time of writing, there are active campaigns from Maine[13] to Rhode Island[14] to California[15] to New York.

II. New York's Public Power Coalition

New York's Public Power coalition emerged in 2017. The coalition includes organizations from around New York State, and encompasses a cross section of environmental justice organizations, citizens groups concerned about climate change, and chapters of the Democratic Socialists of America (DSA).[16][17] The coalition's operating theory is straightforward: "we can't fix greed."[18] The coalition sees the existing for-profit utility systems as unjustly profiting off the basic human need for electricity. The coalition also believes that the only way to ensure a just transition to an electric system fully powered by renewable energy is by bringing energy generation under public and democratic control.[19] The coalition sees the democratic control of energy as a social justice issue, as energy insecurity driven by high utility costs disproportionately affects low-income people, people of color, and immigrants.[20]

The coalition seeks to gain democratic energy control in New York state by passing two bills through the state legislature (collectively, the "New York Public Power Bills"). The first bill, the NY Build Public Renewables Act, would enable the New York Power Authority (NYPA)—

[13] Maine Public Power, https://www.smdsa.org/maine-public-power/ (last visited Nov. 7, 2021).
[14] Providence DSA, Nationalize Grid, https://providencedsa.org/nationalize-grid (last visited Nov. 7, 2021).
[15] East Bay DSA, Let's Own PG&E, https://www.eastbaydsa.org/campaigns/pge/ (last visited Nov. 7, 2021).
[16] *See* Public Power NY, Our Partners https://www.publicpowerny.org/our-partners/ (last visited Nov. 7, 2021).
[17] Lauren Phillips sits on the steering committee of NYC DSA, one of the partners in the Public Power NY coalition. Parts of this section are based on her personal knowledge of the Public Power campaign and coalition.
[18] Public Power NY, About, https://www.publicpowerny.org/about/ (last visited Nov. 7, 2021).
[19] *Id.*
[20] *See, e.g.*, Trevor Memmott et al., *Sociodemographic disparities in energy insecurity among low-income households before and during the COVID-19 pandemic*, 6 Nature Energy 186 (2021), https://doi.org/10.1038/s41560-020-00763-9; Johanna Bozuwa et al., *A New Era of Public Power: A Vision for New York Power Authority in pursuit of Climate Justice*, climate + community project 35 (2021), https://democracycollaborative.org/sites/default/files/2021-05/New-Era-of-Public-Power-NYPA-FINAL.pdf.

New York's existing public power provider, which currently provides power to a small number of governments and other entities throughout the state[21]—to own and build new renewable energy generation, storage, and transmission.[22] The bill would also require NYPA to provide 100% renewable energy directly to all state and municipal leased and owned properties and transportation by 2025, enable NYPA to sell 100% renewable energy directly to customers through usage of any utility's transmission or distribution infrastructure, ban for-profit Energy Service Companies,[23] and more.[24]

The second bill, the New York Utility Democracy Act, would allow New York state to purchase, or obtain via eminent domain, all assets of all energy and gas utilities operating in the state.[25] Among other measures, it would also create democratically elected utility boards, who will determine rate cases and oversee the operations of distribution utilities.[26] Finally, it would restructure utility rates by charging all rate-payers by usage, instead of customer type.[27]

The first bill was introduced in the 2021 legislative session. At the time of writing, it had 49 co-sponsors in the state Assembly[28] and 17 in the state Senate.[29] However, in the 2021 session, the bill was never brought to a vote. Indeed, the state legislature failed to pass any major legislation

[21] New York Power Authority, https://www.ny.gov/agencies/power-authority (last visited Nov. 7, 2021).
[22] Public Power NY, Legislation https://www.publicpowerny.org/legislation/ (last visited Nov. 7, 2021).
[23] Advocates include this provision due to the long history of Energy Service Companies using predatory marketing tactics to target non-english speakers, seniors, and other vulnerable people. *See* Jon Campbell, *Why is Albany Letting These Energy Companies Scam Thousands of New Yorkers?*, The Village Voice, Feb. 2, 2016, https://www.villagevoice.com/2016/02/02/why-is-albany-letting-these-energy-companies-scam-thousands-of-new-yorkers/.
[24] Public Power NY, Legislation https://www.publicpowerny.org/legislation/ (last visited Nov. 7, 2021).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] N.Y. State Assemble, A01466 Summary, https://nyassembly.gov/leg/?bn=A01466&leg_video= (last visited Dec. 27, 2021).
[29] N.Y. State Assembly, S06453 Summary, https://nyassembly.gov/leg/?term=2021&bn=S06453 (last visited Dec. 27, 2021).

related to the climate crisis in 2021.[30] The coalition and its champions in the legislature have vowed to re-introduce the bills in the next legislative session, and recently announced a primary challenge to State Senator Kevin Parker, who is the primary sponsor of the Build Public Renewables Act and leader in the State Senate but who advocates hold responsible for failing to move the bill forward to a vote last term.[31]

III. Potential Legal Challenges for the New York Public Power Bills

A. Takings

One potential hurdle facing the Coalition's efforts to assume ownership and control of all electric utility assets in New York State, or any similar effort in other jurisdictions, is the Takings Clause of the Fifth Amendment to the United States Constitution. While the Takings Clause raises practical concerns that the Coalition must consider, it is unlikely that a constitutional challenge to the public assumption of ownership and control over electric utility assets under the Takings Clause will be successful. Instead, if the current owners of the electric utility assets sought by New York State are provided just compensation by New York, the legal requirements of the Takings Clause are satisfied.

The Takings Clause is a provision in the Fifth Amendment that states, "nor shall private property be taken for public use, without just compensation."[32] The federal Takings Clause applies to state actors through incorporation by the Fourteenth Amendment to the United States

[30] Advocates worry that even the sponsoring legislators are too reliant on donations from fossil fuel and utility companies, whose profits would be threatened by public power, to actually pass the bill. *See, e.g.*, @MHVDSA, Twitter, (June 9, 2021, 10:32 AM) https://twitter.com/mhvdsa/status/1402634619766382594.

[31] Marie J. French, *Climate crisis spurs DSA endorsements in 2022 legislative contests*, Politico (Nov. 24, 2021), https://www.politico.com/states/new-york/albany/story/2021/11/24/climate-crisis-spurs-dsa-endorsements-in-2022-legislative-contests-1394892; *See also* @David4BK, Twitter (Nov. 6, 2021 4:38) https://twitter.com/David4BK/status/1457084966119092227.

[32] U.S. Const. amend. V.

Constitution.[33] The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[34] The purpose of the Takings Clause is to "bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[35]

Applications of the Takings Clause may be broadly placed into two categories. First, a taking occurs where the government assumes ownership and control over private property.[36] Second, a taking occurs where the government, by imposition of a restriction or regulation on the use of property, requires a property owner to suffer a permanent physical invasion of their property or deprives the property owner of all economically beneficial use of their property.[37]

Where the state is contemplating assuming ownership and control over an asset presently held by a private party, as the Coalition ultimately seeks in New York State, the taking falls into the first category of a taking and relatively little legal analysis is needed. Instead, for the Coalition's efforts to survive a Takings Challenge, the state must provide "just compensation" to the electric utilities losing ownership of their assets. Generally, the just compensation that must be provided to a private property owner when the government assumes ownership over the totality of their property is the fair market value of the property as it would be assessed by any reasonable buyer, including any interest necessary to compensate the owner for the equivalent value the property will produce in the future.[38]

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[33] *See, e.g., Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
[34] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).
[35] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[36] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).
[37] *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992); *Loretta v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).
[38] *Seaboard Air Line Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923) ("Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to

Although simple from a legal perspective, the provision of just compensation in the context of electric utility assets will by no means be easy. Consolidated Edison Company of New York ("Con Ed"), the largest of New York's electric utilities, alone maintains infrastructure assets valued at $62 billion.[39] As one can imagine, providing just compensation for all electric utility assets in New York State will therefore constitute a substantial outlay. While the Takings Clause likely does not raise a legal barrier to the Coalition's efforts, the cost of providing just compensation may prove to be a practical barrier to the assumption of ownership over utility assets. The Coalition and lawmakers must consider whether the cost of assuming control over electric utility assets outweighs the public policy behind these efforts and whether a regulatory approach might be more likely to achieve the public policy goals behind the Coalition's efforts.

B. The Dormant Commerce Clause

Another potential Constitutional hurdle to the Coalition's efforts to assume ownership of the electric utility assets in New York State is the Dormant Commerce Clause. This provision is a court-created doctrine implicit in the Commerce Clause. The Commerce Clause gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[40] Historically, the Commerce Clause has been viewed as both a grant of Congressional authority and a limitation on the regulatory authority of the States. The Dormant Commerce Clause refers to the implicit prohibition against state "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[41] While dormant

be added."); *U.S. v. Reynolds*, 397 U.S. 14, 16 (1970) ("[a]nd 'just compensation' means the full monetary equivalent of the property taken.").

[39] Consolidated Edison Company of New York, *10-K filing with the Securities and Exchange Commission*, at p. 7 (Feb. 18, 2021).

[40] U.S. Const. art. I, § 8, cl. 3.

[41] *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (cleaned up); *see also Maine v. Taylor*, 477 U.S. 131, 148 (1986).

commerce clause issues *could* be implicated by the subject legislation, it is unlikely, especially if the design of the legislation pays careful attention to treating in-state entities the same as out-of-state entities.

There are three broad areas where the Courts have identified the availability of a dormant commerce clause challenge. The first is a per se violation: where a state law facially discriminates against out of state commerce, the law can only be upheld if it survives strict scrutiny, i.e. shows that it is "narrowly tailored to advance a legitimate local purpose."[42] Second, where a law's burden on interstate commerce is merely incidental, it is subject to a balancing test: the court must determine whether the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[43] This is known as *Pike* balancing. Finally, the extraterritoriality doctrine prohibits regulations where, by the regulation's "express terms or by its inevitable effect,"[44] it controls conduct that is wholly outside of the state.[45]

Because the proposed legislation would not facially discriminate against out-of-state entities, the strongest dormant commerce clause argument against the New York Public Power Bills is that the proposed laws assert improper incidental regulation of out-of-state activity by preferring NYPA generated power over power generated out-of-state. While there has been no direct legal challenge to state or city ownership of utilities on dormant commerce clause grounds, similar arguments have been made in analogous cases that address state renewable portfolio standards. The Seventh, Eighth, and Tenth Circuits have addressed such challenges.[46]

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[42] *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (cleaned up).
[43] *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).
[44] *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003) (cleaned up).
[45] *See Online Merchs. Guild v. Cameron*, 995 F.3d 540, 553 (6th Cir. 2021) ("To conduct our extraterritoriality inquiry, we ask 'whether the practical effect of the regulation is to control conduct beyond the boundaries of the State'") (quoting *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 373 (6th Cir. 2013))
[46] *See Ill. Commerce Comm'n v. Fed. Energy Reg. Comm'n*, 721 F.3d 764 (7th Cir. 2013); *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016).

In *Energy & Env't Legal Inst. v. Epel*, then-Judge Gorsuch narrowly interpreted the extraterritoriality strand of dormant commerce clause jurisprudence to be limited to: (1) price control statutes, (2) statutes where in state prices were explicitly linked to out of state prices, and (3) laws that facially discriminated against out of state entities.[47] In *North Dakota v. Heydinger*, Judge Loken rejected then-Judge Gorsuch's narrow interpretation of the dormant commerce clause, instead focusing on whether "the practical effect of the regulation is to control conduct beyond the boundaries of the State."[48]

A dormant commerce challenge is unlikely to be a significant hurdle to this legislation under either Circuit's formulation. The first bill implicates no interstate commerce issue because it only enables NYPA to purchase or build renewable energy generation: a process that will clearly occur only within the state. While the second bill may enable out-of-state investor owned utilities to argue that state ownership of all energy and gas utility assets would implicitly regulate price and out-of-state operations, it would be difficult to demonstrate that the practical effect of the law controls conduct out of state. This is particularly true because, unlike many other states, New York's wholesale electricity market, the New York Independent System Operator (NYISO), operates entirely within the state. Finally, there is also a well-known exception to the dormant commerce clause where the state is a market participant.[49] Unlike in the renewable portfolio standard context, any court examining the constitutionality of these laws would have to grapple with the contours of this exception because the bills clearly make the state a market participant. As a result, a dormant commerce challenge is unlikely to succeed against either bill.

[47] *Epel* at 1173.
[48] *Heydinger* at 919 (quotation omitted).
[49] *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.").

C. Municipal Home Rule

As set forth above, the New York Public Power Bills propose to ban for-profit energy service companies and require that municipal leased and owned properties and forms of transportation acquire energy from NYPA. Such a scheme begs the question of whether State legislation requiring localities to obtain energy from the State, rather than private utilities, would infringe on a municipality's constitutional rights to "adopt and amend local laws,"[50] for, among other things, the "transaction of its business,"[51] "management and use of its . . . property,"[52] "protection and enhancement of its physical . . . environment,"[53] and the "government, protection, order, conduct, safety, health and well-being of persons or property therein."[54]

However, this question is quickly resolved by a careful reading of the Home Rule provision of the New York Constitution, which provides that "every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution or any general law* relating to its property, affairs or government" or related to certain enumerated subjects including, as relevant here, those detailed above.[55] Notwithstanding the legislative authority granted to municipalities under the State Constitution and Municipal Home Rule Law, "as a political subdivision of the State, a [municipality] may not enact ordinances that conflict with the State Constitution or any general law" for "[u]nder the preemption doctrine, a local law promulgated under a municipality's home rule authority must yield to an inconsistent state law."[56] Indeed, the New York Court of Appeals has declared that "[e]ven if the Legislature ha[s] not pre-

[50] N.Y. Const., art. IX, § 2(c)(ii).
[51] N.Y. Mun. Home Rule § 10 (1)(ii)(a)(3).
[52] N.Y. Mun. Home Rule § 10 (1)(ii)(a)(6).
[53] N.Y. Mun. Home Rule § 10 (1)(ii)(a)(11).
[54] N.Y. Mun. Home Rule § 10 (1)(ii)(a)(12).
[55] N.Y. Const., art. IX, § 2(c) (emphasis added).
[56] Matter of Wallach v. Town of Dryden, 23 N.Y.32d 728, 743 (N.Y. 2014).

empted the field of regulations, [a municipality's] authority to enact local laws under the Constitution or the Municipal Home Rule Law is conditioned on the exercise of such authority not being inconsistent with any State enactment."[57]

Conclusion

While privately-held utilities are almost certain to resist a regime of public ownership, we identified no insurmountable barriers to state ownership under takings law, the Dormant Commerce Clause, or New York's Home Rule precedent. From these legal perspectives, public power is achievable. The outstanding question is whether advocates can muster the political will and overcome private interests to democratize New York's energy sector.

[57] Consol. Edison Co. v. Town of Red Hook, 60 N.Y.2d 99 (N.Y. 1983) (finding a local law seeking to regulate siting of energy facilities to be an invalid exercise of the town's authority under the State Constitution and Municipal Home Rule Law both because the local law was inconsistent with state law and the state legislature evidently intended to pre-empt the field of regulation).